78-581

IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-851

WILLIAM CAHN,

Petitioner,

against

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

Petitioner's Reply Brief in Support of Petition for a Writ of Certiorari to the Court of Appeals of New York

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Preliminary Statement

Petitioner's brief is submitted in reply to the respondent's brief in opposition to the petition for a writ of certiorari to review an order of the Court of Appeals of New York.

REASONS FOR GRANTING THE WRIT

1. Petitioner's disbarment violated the Due Process, Equal Protection, and Ex Post Facto provisions of the Constitution.

The respondent has not chosen to use its brief to discuss the issues raised by the petitioner. No attempt is made to justify the revised judicial statutory interpretation of the New York State Court of Appeals in the face of 38 years of legislative inaction. No attempt is made to show any comprehensive investigation to warrant a change in disbarment procedures. No attempt is made to justify the elimination of the existing time-tested mechanism to make the focused inquiry into present fitness to practice law. No attempt is made to justify the limited retroactive application of that judicial interpretation. No discussion whatsoever is addressed to that trend of decisions in other jurisdictions scrutinizing and setting aside the collateral effects of a conviction on licensed employment.

Rather, respondent takes this opportunity to retreat from the position which respondent has maintained throughout the two year history of this disciplinary proceeding.

First, the respondent now indicates that the conduct underlying the petitioner's federal conviction would warrant a New York State felony conviction. Throughout this proceeding, the respondent had conceded that such was not the case. Indeed, implicit in the unappealed Order of Reference (Appendix at 4a), was the recognition that the conduct herein did not fall within the purview of a New York State felony statute. Further, respondent's position did not change subsequent to the Court of Appeals decision in *Matter of Chu,* 42 N.Y.2d 490 (1977).

In *Chu,* the attorney had, as here, been convicted of violating 18 U.S.C. §1001. However, there, the conduct underlying that conviction included the procurement, through mercenary marriages, of permanent residence status for aliens. In connection therewith, Mr. Chu made and suborned the making of false and fraudulent documents which were submitted to the Immigration and Naturalization Service and, in addition, suborned perjurious testimony of witnesses. The Bar Association appealed the Order of Reference made therein to the Court of Appeals, claiming that Mr. Chu's conduct did fall within the proscriptions of New York State Penal Law §175.35, a felony, thus requiring his automatic disbarment. The Court of Appeals apparently agreed. However, it is submitted that there can be no automatic equation of 18 U.S.C. §1001 and Penal Law §175.35.

Because of the interpretations of federal felony statutes by district courts, a great variety of conduct, of markedly different magnitudes, can constitute a violation of 18 U.S.C. §1001. However, Penal Law §175.35 provides:

> "A person is guilty of offering a false instrument for filing in the first degree when, knowing that a written instrument contains a false statement or false information, and with intent to defraud the state or any political subdivision thereof, he offers or presents it to a public office or public servant with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office or public servant."

Here, ten claim forms submitted to private organizations from which petitioner sought expense reimburse-

ment were the basis for the ten counts under §1001. However, in not one instance was the claim form submitted to any public office or servant. The claims were not to become, in any way, a part of the records of any public office or public servant. In seven of the ten counts, no false statement was made. Rather, the petitioner was convicted for failing to disclose to the private organizations his payment plan for his confidential informant. In those three counts where a false statement was attributed to the petitioner, unlike New York law (*People* v. *Altman*, 88 Misc. 2d 771 [Sup.Ct. Nass.Co. 1975]), it was not necessary that those statements be proven material. *See United States* v. *Aadal*, 368 F.2d 962 (2d Cir. 1966), *cert. denied*, 385 U.S. 882, 386 U.S. 970.

Further, while the Court of Appeals in *Chu* noted that §1001 does not require a specific intent to defraud, it nevertheless analogized that section to Penal Law §175.35. The Court of Appeals did not comment on the existence of Penal Law §175.30, a misdemeanor statute in all respects identical to §175.35, but, like the federal statute, eliminating the element of the intent to defraud.

The conduct underlying the petitioner's conviction will not support a New York State felony conviction. The respondent has conceded this issue. The Appellate Division, in its Order of Reference, recognized this conclusion.

Further, the fact that such dramatically different conduct as is presented here and as was presented in *Chu* can both support a federal conviction under the same felony statute should require a case by case inquiry before lifetime disbarment is imposed by a foreign forum. Such, it is submitted is required by the interests of justice and fundamental fairness. It is required under the due process provision of the Constitution.

Second, respondent now, for the first time, argues that the petitioner is attempting to use this disciplinary proceeding to collaterally attack his conviction. The respondent was privy to numerous telephone conversations, as well as conferences before the Referee, which carefully established the ground rules for petitioner's scheduled hearing. Both parties, and the Referee, recognized that the hearing could not and was not going to be used to review or attack petitioner's conviction. *See Matter of Levy*, 37 N.Y.2d 279, (1975).

In that regard, after careful review of the Judge's charge in the criminal case, it was recognized that the petitioner was convicted for submitting his claims for reimbursement to private organizations, "believing" that had he disclosed his confidential informant payment plan to the private organizations, they "might" not have reimbursed petitioner. The payments to the informant were an affirmative defense to be established by the petitioner by a showing that the private organizations "consented" to the use of their monies for this purpose. As the private organizations were not made aware of the informant for traditional security and investigatory reasons, this defense could not be established. Therefore, the respondent agreed that the petitioner, at his hearing could testify that he did not intend nor receive any personal benefit as a result of his conduct; that such conduct was simply what he believed to be a good faith attempt to maximize the confidentiality of his informant. The federal criminal court trial judge charged the jury that the petitioner's payment plan could nevertheless, in and of itself, be fraudulent; that no explicit guideline, by-law, regulation, statute, or policy formulation was required to make it so. The criminal court charged that it was more to the point to say that no such gudeline, by-law, etc., explicitly authorized the petitioner's payment plan. Thus, petitioner

could testify at his disciplinary hearing to his motivation and demonstrate the existence of precedent that the presentation of duplicate claims was legal, even where personal benefit was intended. *Cf. Rubin* v. *Empire Mutual Insurance Company,* 25 N.Y.2d 426 (1969).

The respondent concludes by stating that whatever due process protection the petitioner is afforded under the Constitution was satisfied at his criminal trial. Thus respondent argues the *Legislature* of the State of New York can and has determined to subject the petitioner to automatic lifetime disbarment as a result of that criminal conviction without offending the petitioner's guarantees under the Constitution.

Surely, even a state legislature does not have uncontrolled discretion is this area. However, here it is not the legislature which made the determination resulting in the petitioner's disbarment. Rather, such was the determination of the Court of Appeals in the face of a 38 year legislative history which declined to amend Judiciary Law §90(4) in light of the existing statutory interpretation requiring that petitioner be granted a hearing.

The respondent's sole argument addressed to the limited retroactive application of the *Chu* decision is that as a disciplinary hearing is not criminal (although it has been recognized as quasi-criminal), no argument concerning retroactivity can have any merit. For the reasons set forth at pages 10 and 11 of the petition herein, it is again submitted that the limited retroactive application in issue has violated the petitioner's rights under due process, equal protection and *ex post facto* provisions of the Constitution.

Lastly, the respondent notes that this Court has recently denied certiorari in three New York State disbarment proceedings. First, it is submitted that the fact pattern presented herein clearly and uniquely focuses the constitutional issues for the consideration of this Court. Second, the denial of certiorari should not be used as precedent to indicate the lack of meritorious and substantial constitutional questions. Finally, the previous petitions demonstrate that petitioner is not the sole victim of summary disbarment, and thus the issues presented herein are of general importance and should in the interests of justice be considered by this Court.

CONCLUSION

For the foregoing reasons and those contained in the petition, a writ of certiorari should issue to review the order of the Court of Appeals of New York.

Respectfully submitted,

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